



U.S. Department of Justice

Environment and Natural Resources Division

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VIA E-MAIL AND U.S. MAIL FIRST-CLASS

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Michael Callaghan
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Re: *United States and West Virginia Department of Environmental Protection v.
James C. Justice Companies, Inc., and James C. Justice, II,
Civil Action No. 1:15-cv-16018 (S.D. W. Va.)*

Dear Mr. Ball:

Thank you for your letter dated April 30, 2018. We appreciate your clients' commitment to comply with the Consent Decree and "to begin removing the dams according to the plan [EPA] ha[s] reviewed from Potesta Consulting Engineers . . . [n]o later than July 15, 2018 (weather permitting)."¹ On March 12, 2018, in accordance with Paragraph 23 of the Consent Decree, the U.S. Environmental Protection Agency ("EPA") approved (with certain conditions) the Potesta-drafted restoration plan that your clients (James C. Justice, II, and the James C. Justice Companies, Inc.) submitted to EPA in April 2016. *See* Attachment 1.

¹ You state in your letter that "Bellwood Corporation is wholly owned by James C. Justice II and is an affiliate of James C. Justice Companies, Inc.," and that "[t]he property in question is currently owned by Bellwood and for this reason Bellwood is providing this response and the accompanying plan." We are unclear as to Bellwood Corporation's intended role in the upcoming restoration work, but note that under Paragraph 5 of the Consent Decree, "[t]he transfer or ownership or other interest in any Sites . . . shall not alter or relieve the Justice Defendants of their obligation to comply with all of the terms of this Consent Decree." Accordingly, this letter is directed to counsel for James C. Justice, II, and the James C. Justice Companies, Inc. We would appreciate a clarification of Bellwood Corporation's role in these matters.

EPA's approval document represented "the conceptual elements of a restoration plan." Attachment 1 at 3. EPA specified that "[f]inal design decisions, including detailed plans and specifications to the extent necessary and appropriate, must be developed by Defendants consistent with the conceptual elements outlined below and submitted to EPA for review and approval no later than May 1, 2018." *Id.* Although EPA had expected to receive such detailed plans and specifications, we do not wish to see any further delay in the start of restoration work, and so will not insist on a further submission before work can begin. This forbearance is consistent with EPA's March 12 approval. In the limited context of this matter, and in the interest of a prompt start to restoration work, EPA approved Potesta's proposal that "final design decision[s]" would "be made in the field using a modified design build approach." *Id.* However, EPA will continue to monitor Consent Decree compliance, and reserves the right to demand stipulated penalties or otherwise to enforce the Decree. We strongly encourage the Justice Defendants to coordinate closely with both EPA and West Virginia Department of Environmental Protection leading up to and during the restoration work. We prefer to minimize potential disputes during or following restoration work. *Id.*

We presume that you did not intend the six bullet-point list in your April 30 letter to constitute a substitute "plan" for the Potesta plan that EPA approved with conditions on March 12, 2018, or to otherwise deviate from any Consent Decree obligations (including the requirements of Paragraph 23). EPA does not approve any such substitution or deviation. EPA expects that the Justice Defendants will, as stated in your letter, comply with the Consent Decree. Significantly, per Paragraph 26 of the Decree, that includes compliance with EPA's March 12 approval with conditions: "Upon approval of a Restoration Plan (either with or without conditions or modifications by EPA), the Restoration Plan will be deemed incorporated into this Consent Decree, and the Justice Defendants shall implement the Plan as approved or modified by EPA. Restoration and mitigation work at each Restoration Site shall be executed in accordance with the approved schedule."

Please be advised that, even if not intended as a substitute "plan," certain aspects of the planned actions described in your letter would be inconsistent with the Consent Decree. The relevant text from your letter and our responses to those statements are as follows:

- "The rock material from each removed dam will be placed in an approved manner close to the removal point to minimize stream bank disturbance."

Response: Placement of materials from a removed dam "close to the removal point" is the opposite of what the Consent Decree (through the EPA-approved plan) requires. For all dams, "[r]ock, concrete, and/or other materials comprising the structure that is removed should be placed outside floodplain area initially and removed and disposed of in an appropriate upland disposal site." Attachment 1 at 5. The material comprising the dams should be disposed of as specified in the EPA-approved plan.

- "After each dam is removed the next upstream dam will be removed unless it is determined by the Registered Engineer or WV DEP that it is more favorable to the stream quality to leave a dam undisturbed."

Response: The Consent Decree requires removal of all 20 dams. As stated in previous correspondence, EPA scientists have concluded based on first-hand

observations that full removal of all dams is the most environmentally-beneficial course of action. There are no provisions in the Consent Decree allowing the Justice Defendants' contractors or even the West Virginia Department of Environmental Protection to unilaterally determine that certain dams may be left in place. If there are specific dams that the Justice Defendants believe should remain in place for environmental reasons, please inform EPA of that sufficiently in advance of the start of restoration work to allow the parties ample time to discuss the matter. Otherwise, as required by the Decree, all 20 dams must be removed.

- "If weather, time or circumstances prevent the removal of certain dams by September 30, 2018 the removal process will be stopped until July 15, 2019."

Response: Through the EPA-approved plan, the Consent Decree requires dam removal to occur this summer during specified low-water conditions: "All dam structures should be removed during the period July 15–September 15, 2018 during times when precipitation levels during the preceding 30 days is equal to or less than average precipitation during that time period as measured by precipitation data at Union, West Virginia. No work should be conducted within 48 hours after any precipitation event." Attachment 1 at 4. There is no allowance for the Justice Defendants to unilaterally stop work until July 15, 2019. Of course, if unexpected events occur that the Justice Defendants believe may warrant such an extension, EPA will consider a timely request for an extension of the work period.

Your letter mentions the June 2016 flooding as "an additional mitigation factor," but EPA has already taken that event into account by (1) granting multiple extensions of time for submittal of a restoration plan, and (2) visiting the site in 2017 to assess post-flood conditions. EPA received no response to its October 2016 request for the Justice Defendants' views as to how, specifically, the flooding may have altered site conditions and how any such changes might affect restoration requirements. On February 28, 2017, EPA visited the site, along with Potesta staff and other representatives for the Justice Defendants, specifically to assess the post-flooding conditions prior to approval of a final restoration plan. EPA summarized its site visit findings in a July 25, 2017 letter to Potesta and Mr. Callaghan (*see* Attachment 2), including EPA's conclusion that all twenty dams should be promptly removed. In fact, EPA noted that the flooding may have exacerbated the adverse conditions posed by the dams by causing some to partially fail. The Justice Defendants' failure to submit a final plan even after the extensions of time and EPA's post-site visit letter prompted EPA in March 2018 to approve with conditions Potesta's April 2016 plan. Accordingly, EPA does not currently have any reason to believe that the June 2016 flooding warrants any deviations from that plan. However, to the extent that the Justice Defendants' contractors encounter issues during the course of the restoration work that may warrant modification of certain elements of the EPA-approved plan, EPA stands ready to respond quickly and in a cooperative spirit.

Finally, as a courtesy, we wish to inform you that both EPA and the U.S. Department of Justice's Environment & Natural Resources Division have received requests for documents under the Freedom of Information Act, 5 U.S.C. § 552, regarding the Justice Defendants' compliance with the Consent Decree.

Thank you for your prompt attention to this matter, and please contact me if you have any questions or concerns.

Sincerely,

/s/ Austin D. Saylor

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